

I. MOTION

COMES NOW, Respondent Steve M. Lowe, Franklin County Prosecuting Attorney, by and through Ryan E. Verhulp, Deputy Prosecuting Attorney, and moves this Court to dismiss the Petition by Electors and Petition for Writ of Mandamus and Other Relief and in response to Petitioners' Motion and Brief in Support of Emergency Partial Relief.

STATEMENT OF CASE

The Franklin County Auditor, of the Respondents et. al., is a department of Franklin County, a Municipal Corporation in the State of Washington, and hereinafter known as Franklin County. At approximately 9:47 A.M. on Monday, December 6th, 2004, the Franklin County Prosecuting Attorney's Office, and counsel for Franklin County, began receiving electronic documents from counsel for the Petitioners, David McDonald, et. al., amounting to a Petition By Electors and Petition for Writ of Mandamus and Other Relief, and hundreds of attached documents including a motion, briefing, declarations, and exhibits. None of the facts contained in the Petition, Motion, or Briefing entitle the Petitioners to relief as a matter of fact or law.

ISSUES

1. Whether Petitioners' Petition and Motion Should Be Dismissed Pursuant to CR 12(b)(6)?
2. Whether Petitioners' Petition and Motion Should Be Dismissed Due to Petitioners' Failure To Provide Proper Notice of Emergency Hearing?

LAW & ARGUMENT

- 1. Petitioners' Petition and Motion Should Be Dismissed Pursuant to Civil Rule 12(b)(6).**

Franklin County, Respondent, moves this Court for an order of dismissal of this action against said Respondent pursuant to CR 12(b)(6) for failure to state a claim upon which relief may be granted. A court may grant a motion to dismiss pursuant to CR12(b)(6) if, "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." Haberman v. WPPSS, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987) (quoting Bowman v. John Doe, 104 Wn.2d 181, 183, 704 P.2d 140 (1985)). The superior court civil rules apply to mandamus actions. [Peterson v. Dep't of Ecology, 92 Wn.2d 306, 311, 596 P.2d 285 \(1979\)](#).

The Petitioners' entitlement to any relief from Franklin County is negated based on the following. First, the Petitioners have no cause of action against Franklin County. The Petitioners' argue that the Secretary of State failed to require the Counties to correct general election results that were allegedly inaccurate on their face or to investigate allegations regarding lack of uniformity of practices. (Motion, pg. 2). The Petitioners' acknowledge that the law requires the Secretary of State to correct these alleged inaccuracies. Id. Therefore, the Petitioners' have no basis for a cause of action against Franklin County when they acknowledge that the State of Washington has authority over these matters.

Second, the Petitioners' identify only one instance of error in Franklin County's general election based on alleged "inaccuracies" in the Franklin County returns per the tabulating machine and software being unable to produce a count of ballots tabulated equaling the sum of votes cast. (Petition pg. 7 & Motion pg. 3 & Grantham Affidavit pg. 3). The Petitioners' contend Franklin County's results can not be relied upon as these discrepancies and the fact that the county auditor cited software concerns in an email supports their contention (Grantham Affidavit, pg. 3). Yet, the

Franklin County Auditor has explained that the alleged discrepancy was attributable to the multi-card punch card system and a software anomaly which failed to report 12 votes in the summary report over to the statement of vote. (See Zona Lenhart Affidavit, pg. 3). The county canvassing board monitored this issue and found these 12 votes were accurately tabulated despite the software anomaly. Id. As a result, Franklin County has evidenced implementation of measures to ensure all lawful votes are counted. Therefore, the Petitioners' have no basis for a cause of action or relief based on this one allegation of inaccuracies since it was previously addressed by Franklin County.

Third, the Petitioners' have no cause of action or grounds for relief against Franklin County in sections 20, 21, 29, 32, 35, 37, 43, 50, and 51 of the Petition where the Petitioners' allege wrongdoing by "some counties" or "a number of counties." Id. The Petitioners' have presented no evidence that Franklin County had any part of such alleged wrongdoing in the aforementioned sections by their failure to specifically name Franklin County in the allegation. Further, it would be unduly burdensome for Franklin County to respond to any and all allegations they might be referred in through

the Petitioners' use of overly broad and vague language such as "some counties" or a "number of counties." Id. (Petition).

Fourth, the State of Washington found Franklin County's general election process and results to be "correct." Pursuant to RCW 29A.60.250, the County Auditor must formalize a cumulative report of the election and a copy of the certificate of the election for transmittal to the Secretary of State following certification by the county canvassing board. Further, in the event of a recount the county canvassing board shall prepare and certify an amended abstract for transmittal to the Secretary of State for canvassing and certification of the amended abstract. RCW 29A.64.061. Per these election laws, Franklin County certified the general election on November 17th, 2004, and the recount of the general election on November 23, 2004. On November 30, 2004, the Secretary of State indicated that the recount returns were canvassed, verified, and were "the full, true, and correct total of votes cast for each candidate..." These results included those submitted by Franklin County and were deemed to be valid by the Secretary of State as "full, true, and correct."

Fifth, the Petitioners' have no cause of action or remedy for relief against Franklin County as their claim for relief asks the Court to order counties to correct alleged general election voting inaccuracies and for the Secretary of State to take rule-making action to implement uniform ballot procedures. Per Washington law;

The Secretary of State as chief election officer shall make reasonable rules in accordance with chapter 34.05 RCW not inconsistent with the federal and state election laws to effectuate any provision of this title and to facilitate the execution of its provisions in an orderly, timely, and uniform manner relating to any federal, state, county, city, town, and district elections. To that end the secretary shall assist local election officers by devising uniform forms and procedures.

RCW 29A.04.610. Pursuant to the Secretary of State's authority to make reasonable rules Franklin County intends to abide by all current and newly implemented rules resulting from this matter. Further, RCW 29A.68.011 provides the Court with authority to require election officers to perform duties, correct errors, and desist from wrongful acts. Yet, as the aforementioned evidence indicates Franklin County has addressed the Petitioners' allegations of inaccuracies, has attested to compliance with any rule-making authority implemented by the Secretary of State, and has attested

to complying with any court orders related to this matter. (Affidavit of Zona Lenhart, pg. 3-4). As a result, the Petitioners' have no cause of action or remedy for relief against Franklin County.

Finally, the Petitioners' alleged "inaccuracies" in Franklin County's general election process only cite that Franklin County's results can not be relied upon as these discrepancies and the fact that the county auditor cited software concerns in an email supports their allegation (Grantham Affidavit, pg. 3). Yet, as previously mentioned the county canvassing board, which includes the Franklin County Auditor, monitored this issue and found the votes in question were accurately tabulated despite the software anomaly and no further action was necessary. (Lenhart Affidavit, pg. 3). This decision by the Franklin County Auditor and county canvassing board was discretionary.

A court may issue a writ of mandamus to compel an official to perform a non-discretionary act only. [Walker v. Munro, 124 Wn.2d 402, 410, 879 P.2d 920 \(1994\)](#); see also RCW 7.16.160. Further, the court has held that mandamus is extraordinary remedy to be used sparingly and does not lie to compel performance of discretionary act. [R/L Associates, Inc. v. City of Seattle, 811 P.2d](#)

971, 973 (1991). The court will not issue a writ of mandamus to compel a general course of official conduct. Therefore, based on the facts of this matter, a writ of mandamus is not warranted.

The Petitioners' have failed to evidence a cause of action against Franklin County hereby negating a remedy for relief. In addition, any action by Franklin County related to this matter was in the form of a discretionary act of which no authority exists to support relief in the form of a writ of mandamus. As a result, the Petitioners' have failed to state a claim upon which relief can be granted warranting dismissal pursuant to CR 12(b)(6).

2. Petitioners' Petition and Motion Should Be Dismissed Due to Petitioners' Failure To Provide Proper Notice of Emergency Hearing.

Pursuant to RAP 17.4(b), "the person presenting the motion must, at the time the motion is made, file an affidavit stating the type of notice given and the time and date the notice was given to each person." The Respondent, Franklin County Auditor, did not receive notice of such hearing until Monday, December 6th, 2004, via notification from the Franklin County Prosecuting Attorneys Office who was informed of the hearing on the same date. As a result, the Petitioners' failed to comply with RAP 17.4(b) since their

petition and motion was filed on December 3rd, 2004. (See Petition and Motion).

The Petitioners' failure to comply with RAP 17.4(b) resulted in the Franklin County Auditor not receiving service until three days thereafter. Such failure in service prejudiced this Respondent to the extent that they had less than twenty-four hours to respond to a twenty-one page Petition by Electors and Petition For Writ of Mandamus and Other Relief, as well as a twenty-one page Motion and Brief in Support of Emergency Partial Relief (Petition and Motion).

CONCLUSION

Based upon the foregoing, Respondent, Franklin County, respectfully requests the Petitioners' Petition and Motion be dismissed with prejudice for failure to state a claim upon which relief can be granted and improper notice.

Dated this 7th day of December, 2004.

Respectfully submitted,

STEVE M. LOWE
Prosecuting Attorney

By:
Ryan E. Verhulp, #28902
Deputy Prosecuting Attorney

RESPONDENT'S MOTION TO DISMISS PETITION
BY ELECTORS AND PETITION FOR WRIT OF
MANDAMUS AND OTHER RELIEF

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
) SS.
County of Franklin)

COMES NOW Deborah L. Ford, being first duly sworn on
oath, deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 7th day of December, 2004, a copy of the foregoing was delivered to David Burman, Kevin Hamilton, Beth Colgan, William Rava, Attorneys for the Petitioners, by electronic mail and facsimile.

Signed and sworn to before me this 7th day of December,
2004.

Notary Public in and for
the State of Washington,
residing at _____
My appointment expires:

df

RESPONDENT'S MOTION TO DISMISS PETITION
BY ELECTORS AND PETITION FOR WRIT OF
MANDAMUS AND OTHER RELIEF